Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D3-22–3559 OF 1998
LEE SWEE SENG JC
29 NOVEMBER 2011

Civil Procedure — Summary judgment — Enforcement of — Negligence in disposal of shares taken as security — Avenues of appeal exhausted — Whether leave to execute should be allowed after lapse of more than six years — Whether leave to proceed with execution of judgment should be allowed

Limitation — Enforcement of judgment — Summary judgment — Lapse of more than six years — Whether leave to proceed with execution of judgment should be allowed — Whether delay justified — Whether defendants prejudiced

On 30 September 1999, the plaintiff had obtained a summary judgment against the defendant and the defendants appealed to both the High Court and Court of Appeal but were unsuccessful. The defendants then applied for stay of execution which was refused by the High Court. Subsequently, the defendants applied for leave to appeal to the Federal Court which was dismissed. Still undeterred after exhausting all the avenues of appeal, the first defendant filed a separate suit against the plaintiff on the latter's negligence in the disposal of the shares taken as security for the loan extended by the plaintiff bank to the first defendant for which the second and third defendants acted as guarantors. The plaintiff successfully applied to strike out the suit and the first defendant appealed. The first defendant withdrew its appeal, leading the plaintiff to apply for leave to execute the judgment obtained on 30 September 1999. The defendants objected the plaintiff's application and contended that the reasons to justify leave were insufficient. The leave application was dismissed by the senior assistant registrar. The plaintiff filed the present appeal under O 46 r 3 of the Rules of the High Court 1980 and submitted that the delay was reasonable and had been sufficiently explained for the court to exercise its discretion to allow the plaintiff's application for leave to execute the judgment. The issue that arose before the court was whether the leave to proceed with the execution of judgment ought to be allowed after a lapse of more than six years.

Held, allowing the appeal:

(1) The plaintiff should not be denied from enjoying the fruits of its litigation when in fact the plaintiff was being considerate towards the

defendants and was giving them the benefit of their negligence claim and had delayed the execution of the judgment to give leeway and latitude to the defendants should they succeed in their appeal. The leeway and latitude should not be taken as a license to now lambast the plaintiff of laches and limitation (see para 24).

(2) The plaintiff in the present case did not sleep on its right but had at all material times defended the judgment thereby showing the intention to execute the judgment and thus the defendants could not be found to say that they would be prejudiced in any way. In any event the plaintiff's account statement showed that the plaintiff did not impose additional interest against the defendants and therefore there was no injustice or prejudice caused towards the defendants (see paras 31 & 39).

(3) Although the second and third defendants were no longer shareholders and directors of the first defendant they could not hope to escape liability by disposing of their shares to unsuspecting persons and by resigning as directors (see para 37).

[Bahasa Malaysia summary
Pada 30 September 1999, plaintif memperolehi penghakiman ringkas terhadap defendan dan defendan-defendan merayu kepada kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan tetapi tidak berjaya. Defendan-defendan kemudian memohon untuk penangguhan pelaksanaan yang mana ditolak oleh Mahkamah Tinggi. Defendan-defendan kemudiannya memohon untuk izin merayu kepada Mahkamah Persekutuan yang mana ditolak. Masih terhalang selepas menggunakan kesemua cara rayuan, defendan pertama memfailkan guaman berasingan terhadap plaintif atas kecuaian plaintif dalam menjual saham-saham yang diambil sebagai jaminan untuk pinjaman yang diberikan oleh plaintif bank kepada defendan pertama yang mana defendan-defendan kedua dan ketiga bertindak sebagai penjamin-penjamin. Plaintif berjaya memohon untuk membatalkan guaman tersebut dan defendan pertama merayu. Defendan pertama menarik balik rayuannya, membuatkan plaintif memohon untuk izin melaksanakan penghakiman yang diperolehi 30 September 1999. Defendan-defendan membantah permohonan plaintif dan berhujah bahawa alasan-alasan untuk menjustifikasikan izin tidak mencukupi. Permohonan izin ditolak oleh timbalan pendaftar kanan. Plaintif memfailkan rayuan ini di bawah A 46 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 dan berhujah bahawa kelewatan adalah munasabah dan telah dijelaskan dengan mencukupi untuk mahkamah melaksanakan budi bicaranya untuk membenarkan permohonan plaintif untuk izin untuk melaksanakan penghakiman. Isu yang berbangkit di hadapan mahkamah adalah sama ada izin untuk meneruskan dengan pelaksanaan penghakiman patut dibenarkan selepas luput tempoh enam tahun.

Diputuskan, membenarkan rayuan:

(1) Plaintif tidak patut dinafikan daripada menikmati kejayaan litigasinya

apabila pada hakikatnya plaintif adalah bertimbang rasa terhadap defendan-defendan dan memberikan mereka manfaat terhadap tuntutan kecuaian mereka dan telah melewatkan pelaksanaan penghakiman untuk memberi peluang dan kebebasan kepada defendan-defendan sekiranya mereka berjaya di dalam rayuan mereka. Peluang dan kebebasan tidak patut diambil sebagai lesen untuk sekarang mengenakan plaintif dengan laches dan had masa (lihat perenggan 24).

(2) Plaintif dalam kes ini tidak berdiam diri atas haknya tetapi pada kesemua masa material membela penghakiman tersebut dengan itu menunjukkan niat untuk melaksanakan penghakiman tersebut dan oleh itu defendan-defendan tidak boleh mengatakan bahawa mereka akan diprejudis. Walau bagaimanapun penyataan plaintif menunjukkan bahawa plaintif tidak mengenakan faedah tambahan terhadap defendan-defendan oleh itu ketidakadilan atau prejudis tidak dikenakan terhadap defendan-defendan (lihat perenggan 31 & 39).

(3) Walaupun defendan-defendan kedua dan ketiga bukan lagi pemegang saham dan pengarah-pengarah defendan pertama mereka tidak boleh berharap untuk terlepas daripada liabiliti dengan menjual saham-saham mereka kepada orang-orang yang tidak menaruh syak wasangka dan dengan meletakkan jawatan sebagai pengarah-pengarah (lihat perenggan 37).]

Notes

For a case on summary judgment, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2298.

Cases referred to

Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim [2003] 2 MLJ 509; [2003] 1 CLJ 826, CA (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ 219 (Rep); [1989] 1 CLJ 693, HC (refd)

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84 (refd)

Automotive Battery Industries Sdn Bhd v Phua Cheng Kee [2004] 7 MLJ 595, HC (refd)

Chow Seek Kai v Allied Capital Sendirian Berhad High Court of Malaya at Kuala Lumpur in Companies Winding Up No D-28NCC-96-2009, HC (refd)

Duer v Frazer [2001] 1 All ER 249, QBD (refd)

Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal) [2008] 4 MLJ 839; [2008] 6 CLJ 31, CA (refd)

Haji Ahmad bin Lazim & Ors, Re; ex p Bank Kerjasama Rakyat (M) Bhd [1999] 5 MLJ 478; [1999] 2 CLJ 101, HC (refd)

Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm) [2002] 6 MLJ 579; [2002] 4 AMR 4903, HC (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17; [1981] 1 LNS 95, FC (refd)
Othman & Anor v Mek [1972] 2 MLJ 158; [1972] 1 LNS 103, FC (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)
Perwira Habib Bank (Malaysia) Bhd v Golden Produce Sdn Bhd & Ors [1997] MLJU 465; [1997] 3 CLJ Supp 365, HC (refd)
Poh Geok Sing v HB Enterprise Sdn Bhd [2006] 1 MLJ 617; [2006] 1 CLJ 765, CA (refd)
Public Bank Bhd v Seato Trading (M) Sdn Bhd & Ors [1996] 1 MLJ 165; [1995] 1 LNS 326, HC (refd)
Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)
Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd [2002] 1 MLJ 312; [2001] 7 CLJ 560, HC (refd)
Tio Chee Hing v Chung Khiaw Bank Ltd [1981] 1 MLJ 227, FC (refd)

Legislation referred to

Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46 rr 2, 2(1)(a), 3

Khairun Nadia (Kassim Tadin, Wai & Co) for the plaintiff/appellant.
Chong Choh Yoon (CY Chong & Associates) for the defendants/respondents.

Lee Swee Seng JC:

[1] When the plaintiff sought to apply for leave to proceed with execution against the defendants based on a judgment obtained more than six years ago, the defendants promptly objected on ground that no sufficient reasons have been advanced to justify leave. Can the defendants say that seeing that they had applied for stay of execution though successfully objected to by the plaintiff? In the meanwhile the defendants were pursuing their appeal to the Federal Court and the first defendant was also prosecuting another related claim based on negligence against the plaintiff in the disposal of the shares taken as security for the loan extended by the plaintiff bank to the first defendant for which the second and third defendants had stood as guarantors. The defendants failed to obtain leave from the Federal Court to proceed further. The dust did not finally settle until the first defendant withdrew its appeal to the Court of Appeal against the decision of the High Court to strike out the first defendant's claim. By that time the six years have passed. Can the plaintiff apply for leave to proceed with execution in such a circumstance?

[2] Can the defendants having tasted of the sweet aroma of grace extended by the plaintiff to them in withholding execution until the exhausting of all avenues of further proceeding in both suits, now throw the statute book and authorities at the plaintiff and exact the strict application of the law and of limitation and laches?

PROBLEM

[3] On 30 September 1999 the plaintiff had obtained summary judgment against the defendants and on 1 March 2001, the High Court had dismissed the appeal from the summary judgment granted by the senior assistant registrar ('SAR'). The defendants appealed further to the Court of Appeal and on 27 February 2004 the Court of Appeal dismissed the defendants' appeal.

[4] The defendants were undeterred and they sought leave to appeal to the Federal Court. On 13 September 2004 the Federal Court dismissed the defendants application for leave. One would have thought that reality and finality would have sunk in but the first defendant was relentless in rigorously pursuing their cause in a separate suit against the plaintiff in Suit No D4-22–1693 of 2000 at the Kuala Lumpur High Court based upon the same substratum of facts but this time crafting its claim on negligence of the part of the plaintiff in disposing of its shares. The plaintiff here successfully applied to have that suit struck out and it was so struck out by the High Court on 5 November 2004. With an unquenchable spirit the first defendant pursued further with a notice of appeal filed on 26 November 2011 to the Court of Appeal in Civil Appeal No W-02–1362 of 2004. The final curtain or so it seems did not fall until the first defendant withdrew its appeal to the Court of Appeal on 22 March 2010.

[5] It is also important to note that in the year 2002 the defendants applied for stay of execution pending their appeal being heard in the Court of Appeal but the stay was refused by the High Court on 18 February 2002.

PRAYER

[6] With the passage of time moving on inexorably as the defendants strategically staged their battles with the plaintiff, the six years within which execution of a judgment has to be taken out had lapsed. With no more dust that could be stirred over the horizon with the withdrawal of the appeal to the Court of Appeal in the other suit on 22 March 2010, the plaintiff applied for leave to execute the judgment obtained on 30 September 1999. The leave application was dismissed by the SAR and hence the appeal by the plaintiff/appellant to this court in encl 39.

[7] The application was made under O 46 r 3 of the Rules of the High Court 1980 ('RHC') because of the requirement set out in O 46 r 2(1)(a) of the RHC which provides that:

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order.

PRINCIPLE

[8] Order 46 r 2 of the RHC provides that leave of the court is required to execute a judgment or order if six years or more had lapsed from the date of the judgment or order recorded.

[9] Section 6(3) of the Limitation Act 1953 states that any action based upon a judgment could not be executed after 12 years from the date of judgment and no additional interest could be calculated after the period of six years from the date of the judgment had lapsed.

[10] The Federal Court in the case of *Othman & Anor v Mek* [1972] 2 MLJ 158; [1972] 1 LNS 103 had decided that the statutes of limitation which bar the enforcement of a right by action are rules of procedure only. A right which becomes unenforceable merely by reason of limitation does not *ipso facto* perish or vanish into thin.

[11] His Lordship Dr Hj Hamid Sultan bin Abu Backer in the case of *Chow Seek Kai v Allied Capital Sendirian Berthiad* in the High Court of Malaya at Kuala Lumpur in Companies Winding Up No D-28NCC-96–2009 (Commercial Division) had referred to the aforesaid case of *Othman & Anor v Mek* and and also to *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 219 (Rep); [1989] 1 CLJ 693 and stated the following at p 16 of the judgment:

> As a general rule, the statute of limitation stands as a shield and not a sword and must be pleaded to obtain the statutory advantage. And that shield most often paves way to the strong arms or equity. In essence, when the law rails equity may save.

[12] Learned counsel for the plaintiff/appellant submitted that the delay is reasonable and has been sufficiently explained for this court to exercise its discretion to allow the plaintiff's application for leave to execute the judgment.

[13] The way a court of law is to exercise its discretion is captured in the dicta

of His Lordship Chang Min Tat FJ in the Federal Court case of *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 as follows:

> The court has a discretion in the matter and may exercise its discretion in favour of the applicant if satisfied that he is entitled to issue execution and with the cause or causes of the delay.

[14] The cause or causes are as varied as the circumstances of a post-judgment. A peek into some causes that the court in *Tio Chee Ming*'s case has accepted can be seen at p 227 as follows:

> … It was explained that after judgment had been entered, there were negotiations for settlement by arrangement. At that time, the appellant was making substantial payment by instalments towards another judgment sum in Civil Suit No 260 of 1968 and clearly any further pressure on him would jeopardise the settlement of this debt without producing any favourable result in the satisfaction of the new claims. The bank, perhaps not unreasonable, had hoped that so long as the appellant would be making his monthly or periodic payments, it might be in its own interests to give him time to pay off his debts to the bank. Insofar as the land was charged to the bank was concerned, it was thought that sale by private treaty would fetch a higher sum, especially as the land was without potential for development. But as events showed, other creditors had also obtained various judgments against the appellant and had taken execution proceedings. It was time for the bank to act in respect of these two judgment sums which had been entirely unsatisfied …
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> The learned judge formed the view that except for those parts in which the appellant referred to his attempts to settle the claims of the bank, the affidavit was irrelevant to the consideration before him. And as events showed, the various proposals by the appellant to settle the claims of the bank against him failed to produce any result. Nowhere had the appellant contended against the explanation that the reason for the delay in executing the judgments against him was to give him time at his request to resolve his financial difficulties.
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> For ourselves, we are unable, in all the circumstances of the case, to see how the learned judge had exercised the discretion vested in him wrongly. With respect, we entirely agree with his thinking and we accordingly dismiss the appeal with costs.

[15] The Federal Court in the case of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17; [1981] 1 LNS 95 speaking through His Lordship Chang Min Tat FJ stated succinctly with such sagacity at p 20 as follows:

> From the notes of the submission, objection appears to have been taken to the delay in the proceedings occasioned by the bank. It seems to have been stressed with certain didactism that delay defeats equity and that a court in the exercise of its equitable discretion will not forgive latches. But clearly, if there had been any delay in rescinding the agreement and in levying execution for the balance of the judgment-sum, it had been occasioned only by the grace asked for by the defendant and given to him at his request by the bank …

> If in the present case, in such similar circumstances, the High Court had dismissed the application for leave merely on the grounds of delay and laches, it would have, in our respectful view, exercised its discretion wrongly.

[16] The Court of Appeal in the case of *Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim* [2003] 2 MLJ 509; [2003] 1 CLJ 826 appreciated that a sufficient and reasonable reason to support an application for leave will vary from case to case and it is impossible for court to provide an exhaustive list of what is considered to be sufficient reason.

[17] His Lordship Abdul Aziz Mohamad J (as he then was) in the High Court case of *Perwira Habib Bank (Malaysia) Bhd v Golden Produce Sdn Bhd & Ors* [1997] MLJU 465; [1997] 3 CLJ Supp 365 at p 370 (CLJ) dispelled discemedly the diatribe of many a defendant in objecting to leave in this wise:

> The fact is that the first defendants were now consciously under a contract with the plaintiffs about the enforcement of their debt and the longer it took the plaintiffs to enforce the contract the better it was for the first defendants. In the circumstances, the first defendants cannot be heard to say that the plaintiffs had been indifferent about their rights during the six years and that after the six years they thought the plaintiffs were no longer interested to execute the judgment. The fact that the sale of the land under the debenture was delayed and the delay suited the first defendant is as good as their wanting the delay, and although they might not have actually asked for it, having enjoyed it they cannot now come to object to leave on the ground that it was the plaintiffs who had chosen not to act to hasten the recovery of their debt through the sale of the land under the debenture or by some other means.

[18] In the case of *Automotive Battery Industries Sdn Bhd v Phua Cheng Kee* [2004] 7 MLJ 595, the court decided that if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it.

[19] It is the plaintiff's submission that the relevant period is the six years period from the date of judgment ie, until 30 September 2005. The plaintiff further submitted that the following demonstrated sufficient and reasonable causes for the plaintiff's delay in executing the judgment of 7 July 1999:

(a) the defendants' appeal went up to the Federal Court: The plaintiff did not execute the judgment because the defendants' appeal which went up to the Federal Court was still pending. The defendants' appeal was only disposed of when the defendants' notice of motion for leave to appeal was dismissed by the Federal Court on 13 September 2004. The amount owing when the judgment was recorded was a huge and large sum amounting to RM4,871,324.63. The plaintiff's action in delaying the

execution of the judgment is not uncommon when there is an appeal pending against a judgment or order and more so when the defendants had earlier applied for stay of execution and though the plaintiff successfully objected to the stay there was nothing preventing the plaintiff from exercising and extending grace to the defendants until their appeal was disposed of;

(b) Suit No D4-22–1693 of 2000:
the plaintiff did not execute the judgment because the first defendant had filed Suit No D4-22–1693 of 2000 against the plaintiff.
This suit is the first defendant's attempt to relitigate the same cause of action which is the same subject matter in the present case.
This suit is also the first defendant's action to hinder and delay the plaintiff from executing the judgment. The plaintiff rightly applied for the suit to be struck out and the High Court agreed with the plaintiff.
The defendants' notice of appeal dated 26 November 2004 at the Court of Appeal was only disposed of when the first defendant decided to withdraw its appeal at the Court of Appeal.
The first defendant took a period of almost six years to get its appeal heard at the Court of Appeal but eventually and conveniently decided to withdraw its appeal.
The first defendant's decision to withdraw its appeal after almost six years had gone by is a deliberate act to hinder the plaintiff from executing the judgment when at all material time the first defendant is aware that the six year period to execute the judgment had lapsed.

[20] At all material time when the defendants' appeal ended with the dismissal of their notice of motion at the Federal Court and the first defendant's appeal had eventually been struck out at the Court of Appeal for the Suit No D4-22–1693 of 2000, the plaintiff had resisted and defended the appeals and the action under the Suit No D4-22–1693 of 2000.

[21] The plaintiff submitted that this showed that plaintiff did not simply sit on its rights at all material time before and after the judgment lapsed but instead had shown clear intention to defend and further execute the judgment.

[22] Therefore, the defendants are not prejudiced in any way by the plaintiffs' delay in executing the judgment.

[23] If the plaintiff had executed the judgment much sooner ie, when the defendants' appeal are still pending, the defendants would most definitely file an application for stay of execution and/or resist the execution proceeding and thus at the same time would put the execution proceeding on hold.

[24] I find that the plaintiff should not be denied from enjoying the fruits of the plaintiff's litigation when in fact the plaintiff being considerate towards the defendants and giving them the benefit of their negligence claim had delayed the execution of the judgment to give leeway and latitude to the defendants should they succeed in their appeal. That leeway and latitude given to the defendants should not be taken as a license to now lambast the plaintiff of laches and limitation.

[25] The plaintiff further submitted that the defendants had never disputed and denied the plaintiff's claim under the judgment in their affidavit in reply.

[26] The defendants' conduct in applying for stay of execution is tantamount to the defendants asking for stay and though officially the plaintiff cannot be seen to be consenting for fear of setting a precedent, there was nothing preventing the plaintiff from not exercising its right and in deference to the reasons' canvassed by the defendants for a stay, restrained and refrained from executing the judgment obtained.

[27] The plaintiff's counsel also referred to the cases of *Poh Geok Sing v HB Enterprise Sdn Bhd* [2006] 1 MLJ 617; [2006] 1 CLJ 765, *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal)* [2008] 4 MLJ 839; [2008] 6 CLJ 31 and *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 wherein it had been held that it is against both the principle and policy of the law to allow the guilty party to take advantage of his own wrong.

[28] The plaintiff's counsel also drew the court's attention to the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 219 (Rep); [1989] 1 CLJ 693 wherein the court decided that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings.

[29] Both the dictates of conscience and of morality and the demands of equity and fair play as encapsulated in the doctrine of estoppel referred to Lord Denning in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 cited with approval in the *Alfred Templeton*'s case, would not allow the defendants, having tasted the goodness of grace to now taunt the plaintiff with the strict requirement of the law. The magnanimity of the plaintiff bank is being maligned with the mocking of the law in the face of the plaintiff. It is as if the defendants are now taunting the plaintiff for been so foolish as to extend grace to them. The defendants are in effect thumbing their nose at the plaintiff that the plaintiff has only itself to blame for being ensnared by the strategy of the first defendant

in allowing its appeal to the Court of Appeal to become stale and with the lapse of six years to now strategically withdraw its appeal.

[30] Such a conduct of the most unkindest cut of all is unfortunately not without precedent. His Lordship Richard Malanjum J (as the present CJSS was then) in the case of *Koperasi Pembangunan Desa v Merotai Setia Maju Enterprise (sued as a firm)* [2002] 6 MLJ 579; [2002] 4 AMR 4903 observed in a case not too dissimilar to the present case as follows:

> This is not a case where the plaintiffs went to sleep on their rights … On the part of the plaintiffs they had been too amenable towards the defendants for reasons best known to them. It is therefore sad to find having given so much leeway it behoves upon the defendants to use now all the technicalities of the law to avoid the payment on the judgment obtained by default in the first place.
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> Accordingly I should therefore allow the application of the plaintiffs for leave to execute on the judgment pursuant to O 46 r 3 of the RHC in the exercise of my discretion.

[31] The plaintiff in the present case did not sleep on its right but had at all material times defended the judgment thereby showing the intention to execute the judgment and thus the defendants cannot be found to say that they would be prejudiced in any way.

[32] The plaintiff submitted that the defendants in the present case could not rely on the Limitation Act 1953 since it is the defendants' action in taking the appeal up to the Federal Court and that the first defendant intentionally took a lengthy time to dispose the Suit No D4-22–1693 of 2000 and have its appeal heard at the Court of Appeal after a period of almost six years that had induced the plaintiff to delay the execution proceeding of the judgment.

[33] Learned counsel for the defendants relied most resolutely on the case of *Duer v Frazer* [2001] 1 All ER 249 where at p 255 it was held as follows:

> … the court would not, in general, extend time beyond six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the National Westminster Bank case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor.

[34] The special facts and circumstances of the case are captured in the following observation of Evans-Lombe J at p 256: A

> A period of approximately eight years went by between August 1989 and April 1997 when no contact was made between the claimant and the defendant to indicate that the claimant was still pursuing her judgment. Thereafter, when he had been traced to Nevis by the claimant various steps were taken culminating in this application. In the note of Master Hodgson's judgment the following passage appears describing this period: B
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> 'Meanwhile the defendant, for whom one must not have too much sympathy, destroyed his papers 12 years and now finds himself, 14 or 15 years on, having to deal with this. He is now 73 and not in the best of health according to the affidavit of a friend. He has had a heart attack.' C
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> The heart attack occurred in 1992. Sixteen years have now gone by since the German judgment was made and 15 1/2 years since it was registered in England. If execution requires the defendant to leave his house or surrender his possessions it will be much more onerous for him no than it would have been six years after registration. D

[35] It was for those reasons that the court disallowed the leave application. The facts there are poles apart from the present case. Here there was a constant contact in the conflict that escalated all the way to the Federal Court at which point leave was refused to pursue further. The second and third defendants are guarantors against whom judgment had been obtained. E

[36] The defendants are asking the court to believe that substantial prejudice would be caused to the defendants as the interest accrued is based on the rate of 10.9%pa on RM4,871,324.63. If really that was the concern of the defendants, there was nothing preventing the defendants from paying the said sum to the plaintiff so that interest stops running! The plaintiff being a bank would have no problem refunding should the outcome of the appeal be in favour of the defendants. F G

[37] It was also argued on behalf of the defendants that the second and third defendants are no longer shareholders and directors of the first defendant. Surely the second and third defendants have not forgotten that when the loan was granted to the first defendant, they were directors and shareholders of the first defendant. If they had tried to cash out by disposing of their shares, I am sure they would have disclosed to the new shareholders the exposure to liability resulting from the judgment taken against the defendants. They cannot hope to escape liability by disposing of their shares to unsuspecting persons and by resigning as directors. H I

[38] In any event where continuing interest is concerned there is a cutting off

period as set out in s 6(3) of the Limitation Act 1953. Further elucidation of the position where leave is applied for after the lapse of six years from the date of the judgment can be found in the case of *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787, where His Lordship Abdul Hamid Mohamed FCJ (as the former CJ was then) decided that s 6(3) of the Limitation Act 1953 allows an action based upon a judgment to be filed within 12 years but the interest could only be calculated up to a period of six years.

[39] The plaintiff's statement of account dated 11 May 2011 (exh 'NL11') shows that the plaintiff did not impose additional interest against the defendants and therefore there is no injustice or prejudice caused towards the defendants.

[40] It was also contended for the defendants that a 'sufficient reason' as shown in case law is that of a situation where there are 'negotiations for settlement.' Reference was made to *Tio Chee Hing v Chung Khiaw Bank Ltd* and *Public Bank Bhd v Seato Trading (M) Sdn Bhd & Ors* [1996] 1 MLJ 165; [1995] 1 LNS 326. Whilst that may be true, surely the defendants are not suggesting that they stand a better chance to successfully oppose such a leave application after the lapse of six years from the date of judgment by just being obstinately opposed to negotiation for settlement! Surely the composite factors of the circumstances of the case like the defendants very own application for a stay of execution would be a most telling factor as to the stand and stance of the defendants which cannot be translated into a strategy to defeat the plaintiff's claim. Had the defendants succeeded in a stay of execution application they would certainly be estopped from arguing that leave should not be granted to the plaintiff. Now that they had failed to get stay should their position be favourably improved such that they can successfully oppose an application for leave to execute after the lapse of six years? Surely not!

[41] Learned counsel for the defendants contended that the plaintiff's attempt to proceed with a possible bankruptcy action against the back drop of such long delay is futile as indicated in the case of *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312; [2001] 7 CLJ 560 and *Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478; [1999] 2 CLJ 101. If learned counsel had researched further perhaps he would have come across the Federal Court of *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 where Abdul Hamid Mohamad FCJ (as the former CJ then was) observed as summarised at p 259(MLJ); p 787 (CLJ) of the headnotes that:

(1) A bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC. (p 797 b)

(2) A bankruptcy proceeding, by definition of the word 'action' in s 2 LA, is an action and it is caught by the provisions of s 6(3) of the Limitation Act 1953. (p 801 g)

(3) Therefore, a bankruptcy proceeding is an 'action upon a judgment' within the meaning of s 6(3) of the Limitation Act 1953. The limitation for bringing the action is 12 years but arrears of interest may only be claimed for six years, (p 795 g)

(4) Section 6(3) of the Limitation Act 1953 should be read conjunctively; s 6(3) allows an action upon judgment to be brought within 12 years but in such an action arrears of interest may only be claimed for a period of six years, (p 803 d)

(5) Section 6(3) of the Limitation Act 1953 applies to bankruptcy proceedings; and while a bankruptcy proceeding may be brought within 12 years of the date of the judgment, arrears of interest may only be claimed for a period of six years from the date of judgment, (p 803 f).

PRONOUNCEMENT

[42] In the light of the reasons given above, I had no hesitation in allowing the appeal of the plaintiff/appellant against the decision of the SAR. Not to grant leave to the plaintiff to proceed with execution after the lapse of six years from the date of the judgment would be a gross injustice done to the plaintiff/appellant bank.

[43] I however awarded costs of RM5,000 to the defendants/ respondents for the delay in applying for leave which delay does not cause prejudice to the defendants whatsoever.

Appeal allowed.

Reported by Afiq Mohamad Noor